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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

NO. 79-273

DAVID J. POTTER AND CHARLES A. POTTER,
d/b/a POTTER & POTTER,
ATTORNEYS AT LAW ..... *Petitioners*

v

SAM JONES, E. C. HOCHENDEL, JOHN HARDISTY,
CHAR-LITE BRIQUETTS, INC. AND
PINE-O-PINE COMPANY ..... *Respondents*

RESPONSE OF THE RESPONDENTS, CHAR-LITE BRIQUETTS, INC. & PINE-O-PINE COMPANY, TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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The respondents, Char-Lite Briquetts, Inc. and Pine-O-Pine Company, respectfully pray that the Petition for Writ of Certiorari filed herein by the petitioners, David J. Potter and Charles A. Potter, d/b/a Potter & Potter, Attorneys at Law, to review the judgment of the Arkansas Supreme Court entered in this proceeding on April 2, 1979, be denied.

STATEMENT OF THE CASE

Petitioners are attorneys who represented H. E. Richardson, being one and the same person as Howard Richardson, in two separate lawsuits in the Chancery Court of Lafayette County, Arkansas. In 1969, the suit styled "Sam Jones v. John Hardisty and Howard Richardson," Case No. 7442, was initiated. In Case No. 7442, Jones brought suit against Richardson and Hardisty to recover judgment upon a $30,000.00 note. In addition to defending on the note, Richardson and Hardisty filed third party complaints against two additional parties, E. C. Hochendel and Pine-O-Pine Company, claiming indemnity against them for any recovery by Jones. (R. 6-45, Vol. I).

On March 23, 1972, the original case in Cause No. 7442 between Jones as Plaintiff and Hardisty and Richardson as Defendants was fully and completely tried. The trial court and parties agreed that all other issues, being those raised by the third party complaints, would be tried separately on April 20. At the close of the March 23 hearing, the trial judge took the original case under advisement and on April 12, he signed a decree awarding Jones judgment upon the $30,000.00 note and dismissing the counterclaim. (R. 139, Appendix "A" of Petition).

As the parties had agreed, the remaining issues were heard on April 20. At that time, Jones had already won his suit and was not present in court either through counsel or in person. At the April 20 hearing, Petitioners, then acting as attorneys for Hardisty and Richardson as third party plaintiffs, requested an order withholding entry and effect of the decree awarding Jones judgment. A docket entry was made stating that the court considered the order of April 12, 1972, to be an interlocutory order and not a

final one, but the recorded order itself was not changed. (Appendix "B" of Petition). The case on the third party complaints was taken under advisement after the hearing and briefs were submitted. The trial judge, Judge Rowan, died before reaching a decision. Neither the Petitioners, as attorneys for Hardisty and Richardson, nor their clients made any further attempts over the years to have Judge Rowan or his successor in office render a decision on the third party complaints.

In another suit, No. 7647, in the Chancery Court of Lafayette County, Arkansas, styled "H. E. Richardson v. Char-Lite Briquetts, Inc. and Pine-O-Pine Company" Petitioners and their client, Richardson, were pursuing the case to a judgment. (R. 48-61, Vol. II). The original trial court judgment in No. 7647 was dated November 20, 1974. (R. 48-61, Vol. II). This judgment in No. 7647 was appealed to the Arkansas Supreme Court. In November of 1975, Jones obtained writs of garnishment as to Char-Lite and Pine-O-Pine in No. 7442 alleging that they were indebted to Hardisty and Richardson as a result of the judgment in No. 7647. The garnishees, Char-Lite Briquetts, Inc. and Pine-O-Pine Company, answered the garnishments by stating that they were not indebted to the Defendants Hardisty and Richardson because that litigation, No. 7647, was on appeal. (R. 230-239, Vol. I). The opinion on the appeal of No. 7647, dated April 17, 1976, reduced the lower court judgment and awarded Richardson a judgment against Pine-O-Pine and Char-Lite for $13,942.00.

Shortly after the announcement of the opinion of the Arkansas Supreme Court awarding Richardson a judgment against Pine-O-Pine Company in No. 7647, Jones obtained new writs of garnishment against Pine-O-Pine Company

Cause No. 7442. The parties then discovered that the Jones complaint against Hardisty and Richardson in No. 7442 had been dismissed for want of prosecution on January 20, 1975. Chancellor Plunkett, the successor to Chancellor Rowan, then held that Jones, due to Judge Rowan's docket entry finding the decree of April 12, 1972, to be merely interlocutory, had no judgment and therefore quashed the attempted garnishments. (R. 325-326, Vol. I, Appendix "G" of Petition). The two garnishees, Respondents Char-Lite Briquetts, Inc., and Pine-O-Pine Company, were uncertain about the validity of the Jones judgment in No. 7442. Char-Lite and Pine-O-Pine paid the $13,942.00 due in No. 7647 to Richardson and his attorney on May 28, 1976. On the same date, Char-Lite and Pine-O-Pine took an indemnity agreement by which Richardson and the Petitioners agreed to hold them harmless, up to that amount, as against any judgment resulting from the garnishments in No. 7442. (R. 323, Vol. I). In that suit, Char-Lite and Pine-O-Pine filed a cross complaint against Richardson and a third party complaint against Petitioners based upon the indemnity agreement executed by them. (R. 264-267, Vol. I, Appendix "E" to Petition). On May 31, 1977, the Arkansas Supreme Court reversed Judge Plunkett and upheld the validity of the Jones judgment in Cause No. 7442 and remanded that suit for additional proceedings. (R. 8-12, Vol. II, Appendix "H" of Petition).

The Petitioners, after being allowed to withdraw as counsel in the case, and Richardson intervened in the garnishment proceeding and attacked the validity of the writs of garnishment. (R. 26-29, Vol. II, Appendix "L" of Petition). The Petitioners filed additional pleadings alleging failure of consideration as to the indemnity agreement

and a set-off and counterclaim against Respondents Char-Lite Briquetts, Inc., and Pine-O-Pine Company. (R. 20-22, Vol. II, Appendix "J" of Petition). On August 12, 1977, Petitioners also filed a third party action for subrogation against Richardson, Hardisty, Hochendel and Pine-O-Pine Company. (R. 23-24, Vol. II, Appendix "K" to Petition). On October 11, 1977, after notice to all parties, a hearing was held to determine the judgment on mandate in No. 7442. Petitioner David J. Potter was present in person at the hearing on October 11, 1977. On October 20, 1977, Petitioner's counsel, Mr. Boyd Tackett, wrote to the trial judge requesting a hearing on the evidence and an opportunity to submit a brief on the law. (R. 70-72, Vol. II). In the judgment on mandate, signed by Judge Plunkett on November 17, 1977, the court granted a judgment against Char-Lite and Pine-O-Pine on the garnishments and a judgment over against Petitioners and Richardson on the indemnity agreement for $13,942.00. (R. 35-37, Vol. II, Appendix "O" to Petition). On December 1, 1977, Petitioners filed an application for new trial raising the issue of denial of a hearing and requesting that a hearing be held for the purpose of adducing evidence on all issues raised by the pleadings and upon which a trial de novo may be had in the Arkansas Supreme Court. (R. 42, 27, Vol. II, Appendix "P" to Petition). The judge entered a written order dated December 20, 1977, setting the case for a hearing on January 5, 1978. (R. 73, Vol. II, Appendix "Q" to Petition).

At the hearing on January 5, 1978, Petitioner David J. Potter appeared in person and with his attorney, Mr. Tackett. David J. Potter testified for the Petitioners, and exhibits were introduced into evidence through his testimony. (R. 81-123, Vol. II). There were no additional

witnesses called in behalf of the Petitioners at the hearing. The Petitioners' application for a new trial was denied, and they again appealed Cause No. 7442, to the Arkansas Supreme Court. (R. 131 and 134, Vol. II). The Arkansas Supreme Court upheld the judgment in favor of Jones against garnishees and Respondents Char-Lite and Pine-O-Pine. The Court reduced this judgment, and the judgment over and against the Petitioners to the amount of $5,105.00 due to the attorneys fee lien of Petitioners and the assignment of a portion of the judgment. The Arkansas Supreme Court further held that the trial judge, before entering his decree, allowed all parties an opportunity to make a record by proffering whatever testimony they desired to introduce, and that there was not a denial on the hearing on the merits. (R. 162-169, Vol. 2). The Petitioners seek a Writ of Certiorari claiming that they were not afforded a hearing or a fair hearing or trial of their claim in this cause of action.

ARGUMENT

THE TRIAL COURT AND THE ARKANSAS SUPREME COURT CORRECTLY HELD THAT PETITIONERS WERE NOT DENIED A TRIAL AND THEIR CONSTITUTIONAL RIGHT OF DUE PROCESS WAS NOT VIOLATED.

As reflected in the statement of the case and the transcript of this case, the Petitioners were first made parties to this litigation in the trial court on September 7, 1976, and filed their response on September 9, 1976. (R. 264-267 and 269, Vol. I, Appendix "E" and Appendix "F" to Petition). The pleadings against Petitioners were based upon the indemnity agreement signed by or on their behalf on May 28, 1976, indemnifying Respondents against any judgment resulting from certain writs of garnishment by Sam Jones. This indemnity agreement was signed at the time Char-Lite and Pine-O-Pine, being uncertain about the validity of the Jones judgment upon which writs of garnishment were based, paid a judgment in the amount of $13,942.00 to Howard Richardson and Petitioners as their attorneys. (R. 323, Vol. I). On May 31, 1977, the lower court was reversed by the Arkansas Supreme Court which upheld the validity of the judgment upon which the writs of garnishment were based. (R. 8-12, Vol. II, Appendix "H" to Petition). After the filing of numerous pleadings, the trial court held the first hearing to determine the judgment on mandate on October 11, 1977. (R. 35-37, Vol. II, Appendix "O" to Petition). After the request for a hearing or a new hearing by Petitioners, the trial court set the case for final hearing on January 5, 1978, approximately sixteen (16) months after Petitioners were made parties to this suit and approximately six (6) months after the

Arkansas Supreme Court upheld the validity of the Jones judgment. (R. 131, Vol. II). The record is clear that Petitioners were allowed ample opportunity to prepare for for the hearings and were afforded a full and complete opportunity to present all evidence they desired to present and to make a full and complete record for consideration by the Arkansas Supreme Court.

During the interim between the reversal by the Arkansas Supreme Court on May 31, 1977, and the two hearings on this case on October 11, 1977, and January 5, 1978, the Petitioners were given ample time to file numerous pleadings and prepare for these hearings. Petitioners moved to withdraw as counsel for Richardson and Hardisty on July 15, 1977, some ten months after they were made parties to this litigation based upon the indemnity agreement signed by them. (R. 13-14, Vol. II). The Petitioners filed their amended answer to the cross complaint filed by Respondents, their counterclaim and claim for set-off against Respondents and their third party complaint against Respondents and others on August 16, 1977. (R. 20-24, Vol. II, Appendix "J" and Appendix "K" to Petition). From these pleadings, it is obvious that the complaints against Respondents and the other parties are based upon the claims involved in the original third party action filed by Richardson and Hardisty against the Respondents and upon the indemnity agreement signed on May 28, 1976. Exclusive of the issues surrounding the indemnity agreement, the issues involved in the original third party complaint against the Respondents had been awaiting the decision by the trial co rt, without any action on the part of the Petitioners and their clients, since April 20, 1972. (R. 139, Vol. I). On August 26, 1977, the Petitioners also filed their intervention in opposition to the garnishments.

As reflected in the judgment on mandate entered by the trial judge, on October 11, 1977, after notice to all parties, a hearing was held relating to the request of the Plaintiff Jones for a judgment on mandate, at the hearing on October 11, 1977, all parties were present either in person or through their attorneys. Petitioners' counsel, Mr. Tackett, was unable to attend the hearing, and David J. Potter appeared in behalf of and as one of the parties. The trial court took the matter under advisement after statements and arguments were made by counsel and parties. (R. 35-37, Vol. II, Appendix "O" to Petition). Petitioners' counsel, Mr. Tackett, wrote the trial judge a letter on October 20, 1977, (R. 70-72, Vol. II), stating that he was unable to attend the hearing on October 11, 1977, and that he was sure that David Potter, an attorney, could represent himself in absence of his counsel. Mr. Tackett's letter further states that the opinion of the Arkansas Supreme Court stated that the third party claims had been awaiting decision since June 8, 1972. Mr. Tackett's letter goes on to state:

> This indicates to me that the third party claims should be considered by the Court, and if possible, a decision on the third party claims could be entered at the same time as the judgment on the Plaintiff's claims. The transcript of those trial proceedings is complete and is available for the Court's use in making a finding on the third party claims. We request that this be done. (R. 70, Vol. II).

These third party claims mentioned in Mr. Tackett's letter of October 20, 1977, with the exception of the indemnity agreement signed by Petitioners, are the basis for all of Petitioners' pleadings and claims against the Respondents and other parties in this suit. It is clear from this letter that Petitioners are seeking to have the trial judge review the transcript of the trial proceedings which were complete since April 20, 1972, and to make a determination on the third party claims which were the basis of their claims in this litigation. This determination could be made upon reviewing the transcript and considering the pleadings of the parties.

The letter of Petitioners' counsel of October 20, 1977, to the trial judge went on to state:

> If, for some reason unknown to me, the Court concludes that the garnishment action is valid, even without the bond and other prerequisites of the law, then it will be necessary to proceed with a hearing to make a request of the evidence concerning the garnishment actions, indemnity, etc.
>
> Had I been present for the conference to consider what action from the Court was necessary in light of the Opinion and Mandate of the Supreme Court, I would not have been prepared to introduce the evidence concerning the garnishment, indemnities, suretyships, etc., because I did not anticipate that to be relevant to the decision concerning the Mandate. After a hearing on the evidence, should that be necessary, we would also desire an opportunity to submit our brief on the law concerning the garnishments, indemnities, suretyships, etc. (R. 71, Vol. II).

Thus, it is clear from this letter that Petitioners were requesting a final decision on the third party claims and an opportunity to present testimony and evidence if the trial judge should determine that the garnishments were valid. As the further record reflects, the trial judge ultimately followed all of Petitioners' requests by reviewing the transcript and deciding the third party claims and allowing Petitioners a full and complete hearing, with proper notice and opportunity to present and introduce evidence and make a complete record on all aspects of this litigation.

As soon as the trial court entered its judgment on mandate granting a judgment over against Petitioners on the indemnity agreement, Petitioners filed their application for a new trial. (R. 42, 27, Vol. II, Appendix "P" to Petition). In their application for new trial, Petitioners, among other things, alleged as follows:

> By virtue of the interest of David J. Potter and Charles Potter, d/b/a Potter and Potter, as indemnifiers upon the garnishment, and by virtue of their right to subrogation against all parties who may legally owe any or all of the debt to Sam Jones if said debt is sustained upon appeal, said applicants, Potter & Potter, are vitally interested in the third party actions of Howard Richardson and John Hardisty against E. C. Hochendel and Pine-O-Pine Company as third party defendants in the original cause of action. That this cause of action was dismissed "for want of equity" without further explanation by the trial court and without recitation that the Court had examined the transcript of testimony and record which has been completed and filed with the Supreme Court.

> Applicants herein desire to make a record and present evidence on all issues raised in the first amended answer to Cross-Complaint and third party complaint including the set-off and counter-claim against garnishees, the intervention of applicants Richardson and Potter & Potter and upon the third party complaint. (R. 43, Vol. II).
>
> . . . David J. Potter and Charles Potter, d/b/a Potter & Potter, attorneys at law, pray . . . that a hearing be held for the purpose of adducing evidence on all issues raised by the pleadings and upon which a trial de novo may be had in the Arkansas Supreme Court from an appeal in this cause. (R. 46, Vol. II).

By order dated December 20, 1977, the trial judge set the case for a hearing again on January 5, 1978. (R. 73, Vol. II, Appendix "Q" to Petition). At the hearing on January 5, 1978, Petitioner David J. Potter appeared with his attorney, Mr. Tackett. At the beginning of the January 5 hearing, the trial judge stated:

> Gentlemen, the purpose of this hearing is to complete the record in this case and resolve any remaining problems with the record. Mr. Tackett has stated that he would like to enter something else in the record. For the record, I would say that if it has not been clear, this Court has tried to structure a judgment on the mandate in such a manner as to bring all of the issues to a close and I have had access to, of course, the Court file. Mr. Compton had in his possession the transcript, and he, of course, made that available to me. I have had your briefs. I have had Judge Rowan's notes. So,

> that is the basis upon which the Court has put up its judgment. I think in October we were supposed to cover all issues, but I certainly want a complete record in this case. I think that's the essence of Mr. Tackett's Motion. (R. 77, Vol. II).

Petitioners' counsel responded to the Court stating:

> Judge, if I understand it right, you are overruling the Motion for a New Trial, but you are willing to accept into the record evidence? Am I correct? (R. 78, Vol. II).

Then Petitioners' counsel went on to state at the January 5 hearing Petitioners' position as to all their claims in regard to defending against the garnishments and the indemnity agreement and their position as guarantors and claims of subrogation. (R. 78-80, Vol. II). After explaining the position of the Petitioners to the court, in regard to all legal and factual matters, Petitioners' counsel stated in summary:

> Judge, that is the contention in this instance wherein we would like to introduce some testimony. I want to make it as short as possible because the Court has been messing with this thing since 1971 or 1972. I started messing with it in '68 and I know, or I can't imagine, much more that could be put into the record, but we would appreciate the opportunity to put something into the record concerning these elements that we have raised. (R. 80, Vol. II).

One should note that neither Petitioners nor their counsel raised any objection whatsoever at the hearing on January 5, 1978, to proceeding with a complete hearing and present-

ing their evidence on all issues at that time. It is obvious from the Court's statement that the trial judge had reviewed the transcript concerning the third party claims in the original suit and had rendered a decision as Petitioners had requested. It is also obvious that the trial judge had granted a hearing or trial on all issues as the Petitioners had requested. Then Petitioner David J. Potter proceeded to take the witness stand and give his testimony. (R. 81-123, Vol. II).

Mr. Potter testified concerning the amount of attorneys fees and the court costs which were deducted from the judgment in No. 7647. Obviously, this testimony was considered by the Arkansas Supreme Court which reduced the judgment over against Petitioners to $5,100.00, the net amount received by Richardson from the judgment. Mr. Potter further testified concerning his signing the indemnity agreement and his position that Petitioners should be indemnified or subrogated to each party in the suit eventually obligated to Sam Jones. At the close of Mr. Potter's testimony, his attorney stated:

> Now, Judge, as far as I am concerned that constitutes the testimony on behalf of Potter and Richardson. (R. 94, Vol. II).

As one can readily see, there was no statement by Petitioners or their counsel that they had not been given proper notice of hearing or that they desired an additional hearing or desired to present additional testimony or evidence, and there was no objection from them stating that a full hearing on all issues had not taken place. The record clearly reflects that the trial judge granted all of Petitioners' request, namely, a decision, after reviewing the transcript, on the third party claims in the original suits

which had been pending for years and an opportunity to prepare for and have a full and complete hearing or trial on all of Petitioners' claims. The Arkansas Supreme Court then considered the record from January 5, 1978, trial or hearing and determined that a hearing on the merits had not been denied. (R. 162-169, Vol. II).

Petitioners have contended that the January 5, 1978, hearing was a sham or pretense since the trial judge stated that he was going to deny the motion for new trial before hearing any arguments, testimony or other evidence. At this point, the trial judge had obviously reviewed the transcripts of the hearings at which all evidence had been presented and had reviewed all the pleadings. Although the trial judge had decided to overrule the motion for new trial, he allowed Petitioners to present all evidence which they desired to present for his consideration and for consideration by the Arkansas Supreme Court. (R. 77, Vol. II). The transcript reveals and the fact is that Petitioners were allowed and participated in precisely what their pleadings requested, namely, a hearing for the purpose of introducing evidence on all issues raised by the pleadings and upon which a trial de novo may be had in the Arkansas Supreme Court from the appeal of the case.

Respondents cannot and do not disagree with the legal holdings mentioned by Petitioners contained in the case law cited in Petitioners' brief in this Court. Respondents simply state that these cases do not apply to the facts at issue here because Petitioners were afforded protection of their constitutional rights by notice of hearing and opportunity to prepare for hearing, opportunity to be heard and present evidence and a full, complete and fair hearing before the trial court and the Supreme Court of Arkansas.

CONCLUSION

In conclusion, Respondents contend that Petitioners' rights to due process under the United States Constitution have been protected in that Petitioners have been allowed to develop full and complete evidence to support their pleadings and claims and have had an opportunity for a fair trial of all defenses and claims raised by them before the trial judge and before the Arkansas Supreme Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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